JAN 27 1995

No. 94-1076

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

WENDY RITZ, IN HER INDIVIDUAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Petitioner,

v.

CARY JAMES GAGAN,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an Assistant Attorney General for the State of Colorado is entitled to absolute prosecutorial immunity for conduct undertaken as an advocate on behalf of the State in a habeas corpus proceeding.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

APPLICABLE STATUTES..... 1

STATEMENT OF THE CASE..... 5

SUMMARY OF THE ARGUMENT..... 12

ARGUMENT..... 13

I. PETITIONER'S ARGUMENT WOULD REQUIRE THIS COURT'S REVIEW OF COLORADO STATE LAW..... 13

II. IT IS UNDISPUTED BELOW AND IN THIS COURT AS WELL, THAT WHEN A STATE DOES GRANT AS A MATTER OF RIGHT A POSTCONVICTION REMEDY, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS INDIGENT PERSONS LIKE RESPONDENT FROM INVIDIOUS DISCRIMINATION IN THE APPELLATE PROCESS..... 17

III. A STATE ATTORNEY, WHEN PERFORMING THE FUNCTION OF A COURT REPORTER, IS NOT ENTITLED TO ABSOLUTE IMMUNITY.....21

CONCLUSION.....25

TABLE OF AUTHORITIES

Page

Statutes

28 U.S.C. 2254(f).....1, 11, 16, 25

Rule 5 (Governing Sec. 2254 Cases)..... 1,7, 11, 16, 25

28 U.S.C. 753(b).....2, 21

Colo. Rev. Stat. 13-5-127.....2-3

Colo. Rev. Stat. 35(c)(Rules of Crim.P.).....1-2,8-9,12-13, 15,

Cases

Antoine v. Byers & Anderson, 113 S.Ct. 2167(1993)...10, 21-22

Bates v. Foree, 67 Ky (4 Fush) 430 (1868).....22

Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993).....22

Burns v. Reed, 111 S.Ct. 1934, 1944 (1991).....22

Duttry v. Petstrock, 878 F.2d 123,124 (3d Cir.1989)...17

Flamer v. Chaffinch, 774 F.Supp. 211 (D.Del. 1991)....17

Forrester v. White, 484 U.S. 219 (1988).....21

Gardner v. California, 393 U.S. 367 (1967).....18, 19

Garrison v. Brown, 405 U.S. 985 (1972).....25

Griffin v. Illinois, 351 U.S. 12, 891.....11

Haines v. People, Colo. 454 P.2d 595.....11

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 489 (1965).....14

Jones v. District Court, 780 P.2d 526 (Colo. 1989)....3, 14

Keady v. Owens, 30 Colo. 1, 69 P. 509 (1902).....3

Lujan v. Colo. St. Bd. Of Educ., Colo. 649 P.2d 1005....4

McCray v. State of Maryland, 456 F.2d 1,3 (4th Cir. 1972).....24

Patterson v. Medberry, 290 F.2d 275 (10th Cir. 1961).....18

TABLE OF AUTHORITIES-Continued

Page

People v. District Court, Colo. 549 P.2d 778.....14

Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978).....11, 21

Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990).....10

Smith v. Bennett, 365 U.S. 708 (1961).....18, 19

Tooley v. District Court In And For Second Judicial District, Colo. 549 P.2d 775.....14

Townsend v. Sain, 83 S.Ct. 745 (1963).....8

Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989).....21

Wade v. Wilson, 396 U.S. 282 (1968).....8

Webster v. Gibson, 913 F.2d 510 (8th Cir. 1990).....21

White By Swafford v. Gerbitz, 860 F.2d 661.....21

Imbler v. Pachtman, 424 U.S. 409 (1976).....10,16,21

Rules

S.Ct.R. 10.....26

APPLICABLE STATUTES AND RULES
(Relevant)

28 U.S.C. 2254.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissable in the Federal court proceeding.

Rule 5 Governing Section 2254 Cases. Answer; contents

The answer shall respond to the allegations of the petition. ...The answer shall indicate what transcripts (of pre-trial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded and not transcribed...The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished...

In addition to the mandatory imposition which attaches to the State, Rule 5 accords discretionary authority to the district court to order such identification and presentation if warranted by the circumstances of the situation...

Rule 35 of the Colorado Rules of Criminal Procedure, C.R.S. 1988

(a) Correction of Illegal Sentence

(b) Reduction of Sentence

(c) Other Remedies

(2) Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make application for postconviction review upon the grounds hereinafter set forth. Such an application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

I. That the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the Constitution or laws of this state;

III. That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

VI. Any grounds otherwise properly the basis for collateral attack upon a criminal judgment.

28 U.S.C. 753(b)

.....The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of the court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of the court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

Section 13-5-127, C.R.S. 1988 Repl. Vol. 6A. Duties of Reporters. The shorthand reporter, on direction of the court, shall take down in shorthand all the testimony, rulings of the court, exceptions taken, oral instructions given, and other proceedings had during the course of trial of any cause, and in such causes as the court may designate.[1]

Section 24-31-101, C.R.S. 1986 Repl. Vol. 10A. Powers and duties of Attorney General.

(1)(a) The attorney general of the state shall be the legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch. He shall attend in person at the seat of government during the session of the general assembly and term of the supreme court and shall appeal for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested.

(f)(3) The attorney general may appoint such deputies and assistants as are necessary for the efficient operation of his office within the limitations of appropriations made therefor by the general assembly.

Section(s) 20-1-102 and 20-1-201, C.R.S. 1986 Repl. Vol. 8B. District Attorneys...Appear on behalf of state and counties...Deputies-chief deputies-staff.

C.R.S. 20-1-102...

(1) Every district attorney shall appear in behalf of the state and the several counties of his district:

(a) In all indictments, actions, and proceedings which may be pending in the district court in any county within his district wherein the state or the people thereof or any county of his district may be a party.

C.R.S. 20-1-201...

(c) The district attorney in every judicial district is authorized to appoint such special deputy district attorneys as he deems necessary to properly discharge the duties of his office, and such special

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1/ The Colorado Supreme Court in Jones v. District Court, 780 P.2d 526 (Colo. 1989)(quoting Keady v. Owens, 30 Colo. 1, 69 P. 509 (1902)), has addressed the duties of court reporters (C.R.S. 13-5-127) and in regards thereto, stated in part: "a court reporter has a sworn duty to provide a transcript of the record to the party requesting it, and the order of the judge of the court not to furnish it is of no excuse or justification whatever". Jones, 780 P.2d at 529.

shall hold their offices during the pleasure of such district attorney.....such special deputies shall only be appointed from among those persons holding office as attorney general, deputy attorney general....[2]

COLORADO CONSTITUTION
(Relevant Provisions)

ARTICLE II, SECTION 25.

Section 25. Due Process of Law. No person shall be deprived of life, liberty or property, without due process of law.[3]

2/ The Office of the District Attorney represents the People at the trial court level; except when ordered by the governor and/or appointed (as a special deputy district attorney) by the District Attorney, the Attorney General and/or an Assistant Attorney General has no lawful authority at the state trial court level.

3/ Although the Colorado Constitution does not contain an identical provision to that of the Fourteenth Amendment to the United States Constitution, that declares that no state shall deny a person equal protection of the laws, it is well-established that a like guarantee exists within the Colorado constitution's due process clause of Art. II, Sec. 25, and that its substantive application is the same insofar as equal protection analysis is concerned. E.g. Lujan v. Colorado State Bd. of Educ., Colo. 649 P.2d 1005.

STATEMENT OF THE CASE

Petitioner's ("Ritz") factual assertions in her statement of the case fails to make reference to the indisputable fact that the alleged "countermanding" by Ritz of three state court orders and one federal court order for court reporters to produce this Respondent's trial transcripts was accomplished solely as a result of this Respondent's status as an indigent defendant-petitioner.[4]

As a result of the Respondent's indigency court orders were required for the sole purpose of having the State pay the Reporters for producing the Respondent's trial transcripts. In opposite, if Respondent a "wealthy" defendant-petitioner these court orders (for these Reporters to produce Respondent's transcripts) would not have been a prerequisite, as the Respondent himself making the financial arrangements with the Reporters to produce the trial transcripts... and Ritz, as an assistant attorney general, then not being provided the opportunity to (allegedly) countermand these court orders that per state and federal statutes required the Reporters to produce and/ or comply in good faith with the court's orders to produce Respondent's trial transcripts.

The main thrust of the petitioner's statement of the case is that Ritz, as an assistant attorney general representing the State in the federal habeas corpus proceeding, was never advised (until March 24, 1992) of Judge Joyce C. Steinhardt's state court order

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4/ The record in the Tenth Circuit Court of Appeals confirming this issue presented by this Respondent in his briefs and considered by the Tenth Circuit in rendering its decision.

of March 22, 1991 that ordered the Reporters to produce this Respondent's trial transcripts. Petition, pp. 2,3,4 and 5. This is not the case. Being that Ritz was not a party to the Respondent's state court post-conviction proceedings, Judge Steinhardt, this Respondent or any other state court representative under no legal obligation to serve on Ritz any formal notice of either the Respondent's motion for transcripts and Judge Steinhardt's order granting the motion and ordering the Reporters to produce the transcripts.

Yet, in regards to the Respondent's (exhausted) speedy trial claim in the federal habeas corpus proceeding, these non-transcribed transcripts were also relevant and/or supportive of Respondent's arguments of speedy trial violations. Accordingly, Respondent served on Ritz copies of the motion for preparation of transcripts at state expense (April 3, 1991) and court documentation from the state court that advised Ritz of Judge Steinhardt's state court order (April 16, 1991).[5]

Petitioner's factual assertions in the statement of the case also fails to inform this Court that the record in the Tenth Circuit Court of Appeals confirms that the Reporters failed to comply with the court ordered deadline(s) to file Respondent's trial transcripts ordered by state court judge Deanna Hickman. Petition, Appendix D.

5/ The record of the district court and appellate record contain evidence that the Office of the Attorney General (Ritz) acknowledged receipt of the motion for transcripts and the court documentation from the state court advising Ritz of the state court order issued by Judge Steinhardt for the Reporters to produce Respondent's trial transcripts. In addition, the record below confirming that Ritz was also advised of Judge Steinhardt's order on May 16, 1991, July 19, 1991, and February 13, 1992.

Judge Hickman ordering on March 25, 1992 that the remaining transcripts be filed within 30 days of the order. The record below showing that the transcripts not filed by the Reporters until July 24, 1992, and the record below confirming that this Respondent alleging that Ritz now "countermanded" Judge Hickman's order of March 25, 1992, and alleging that Ritz had continued to instruct the Reporters to delay the filing of Respondent's transcripts.[6]

Petitioner also includes within her statement of the case, portions of the recommendation of United States Magistrate Judge O. Edward Schlatter and a portion of the order of dismissal entered by Judge Zita L. Weinshienk. Petition, pp. 6,7. These opinions of Magistrate Judge Schlatter and Judge Weinshienk, on the whole, suggesting that these "non-transcribed" transcripts ordered produced by the state trial court could not be considered by the federal habeas court in regards the Respondent's federal habeas action. As stated under Rule 5 Governing Section 2254 Cases, "the court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished..." (emphasis supplied). Thus, it is without question these non-transcribed transcripts could be considered by the federal court in regards to Respondent's (exhausted) speedy trial claim.[7]

6/ Not until July 20, 1992 did Reporter Heymans transcribe her notes of the court ordered (4 times) transcript of October 5, 1987. And this act by Reporter Heymans coming several hours after this Respondent, in the civil rights action, had filed and served on Ritz's counsel a motion to amend complaint and add Reporter Heymans as a defendant.

7/ Respondent not raising any new claims in the federal habeas case; Respondent requesting the federal court review the non-transcribed transcripts in regards to the exhausted speedy trial claim.

Moreover, Petitioner's factual assertions fail to point out to this Court is that only when the Reporters had not (by November 1991) filed the transcripts that were to be filed on or about July 1, 1991, did the Respondent file in the federal habeas case a motion to complete the record (November 7, 1991). The Reporters had not sought any extensions of time and had refused to reply to the Respondent's repeated attempts to assertain the reason(s) for the delay in filing the transcripts.[8] Accordingly, having exhausted his state remedies in regards to obtaining specific trial transcripts, the federal court on November 8, 1991 issued its order to Ritz to have the Reporters produce specific trial transcripts[9] to complete the record in the habeas case. Wade v. Wilson, 396 U.S. 282 (1968); Townsend v. Sain, 83 S.Ct. 745 (1963)(a district court sitting in habeas corpus clearly has the power to compel production of the complete state-court record).

Finally, Petitioner fails to inform this Court that the record below confirms that these transcripts were so pertinent to the Respondent's Crim. P. 35(c) motion to vacate judgment and sentence, a pro se motion filed by Respondent in the state trial court on

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8/ The record below confirming that when the Reporters had not complied with their own set deadline (to file the transcripts) of July 1, 1991, Respondent made attempts by correspondence and phone calls,directed to the Reporters between July-Oct.'91), to assertain the reason for the delay and when the transcripts would be filed. The Reporters never re-contacting Respondent.

9/ This order directing Ritz to have the Reporters produce the same transcripts that had been ordered produced by and through the state court order issued by Judge Steinhardt on March 22, 1991. Previously, on July 19, 1991, another Reporter (lead court reporter Rosemary DeMartini) had filed in the federal court transcripts ordered prepared and/or produced by Judge Steinhardt. Ritz not objecting to these less pertinent trial transcripts being made part of the habeas record.

August 30, 1991, counsel that had been appointed (Oct.'91) to this postconviction proceeding by Judge Steinhardt delaying the filing of a memorandum in support of Respondent's 35(c) claims, as well as delaying the setting of a hearing under Rule 35(c), until a review of these transcripts could take place by this counsel.[10] The record below confirming that the subsequent dismissal of the Respondent's Crim. P. 35(c) motion to vacate judgment and sentence the direct result of this alleged intentional transcript delay, and Ritz's alleged continued "countermanding" of state court orders for the Reporters to produce Respondent's trial transcripts.[11] In addition, counsel in the federal habeas corpus proceeding had had the federal court hold the habeas proceeding in abeyance pending a resolution of the Respondent's state postconviction proceedings. **(Exhibit A)**

10/ The 35(c) motion raising claims of: (1) denial of equal protection of the laws; (2) ineffective assistance of appellate counsel and trial counsel; (3) insufficient information/variance between allegations and proof; (4) sufficiency of evidence and; (5) illegal and void sentences. Respondent's appointed appellate counsel refusing to raise these claims on direct appeal and refusing to have these at issue transcripts designated for the record on appeal.

11/ Judge Deanna Hickman appointed to Respondent's postconviction matters upon the retirement of Judge Steinhardt on January 1, 1992. Prior to being appointed as a state district court judge, Judge Hickman Chief of the Trials Unit for the Office of the Attorney General of Colorado. Upon being advised that this Respondent had used Judge Hickman's fact finding (regarding the transcript delay) to file a civil rights suit against Attorney General Gale Norton and Assistant Attorney General Wendy Ritz, Judge Hickman withdrawing her order of March 25, 1992, then on August 19th and November 2, 1992, entering orders dismissing Respondent's Crim. P. 35(c) motion for a "failure by Respondent's counsel" to file a memorandum in support of Gagan's 35(c) claims...when this counsel had not had the opportunity to review the delayed transcripts until July 24, 1992 at the earliest.

Now in her statement of the case Ritz advances several legal arguments that in regards to her alleged actions (countermanding state and federal court orders for Reporters to produce trial transcripts for appeals), not only were these alleged actions "within the scope of her duties as an advocate in the federal habeas case", but these alleged actions were "intimately associated with the judicial process" and Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), extending absolute immunity to Ritz under these circumstances. Petition, pp. 8-12. Ritz is alleged to have "countermanded" two different state trial court orders that ordered court reporters to produce Respondent's trial transcripts. Ritz, under the circumstances of this case (no order from the Governor or appointment by the district attorney as special deputy district attorney), is without any colorable authority at the state trial court level and any alleged unlawful actions by Ritz at the state court level outside the scope of her duties as an advocate in the federal habeas corpus proceeding. Sec. 24-31-101 C.R.S. 1986 Repl. Vol. 10A; Sec. 20-1-201, C.R.S. 1986 Repl. Vol. 8B; **Snell** v. **Tunnell**, 920 F.2d 673 (10th Cir. 1990)(superseded discretionary authority of district attorney and absolute immunity not warranted).

In addition, being that Ritz's alleged unlawful actions are in regards to the production of Respondent's trial transcripts, these actions are not intimately associated with the judicial process and actions taken by Ritz in the role of a court reporter and absolute immunity not applicable in this case. **Antoine v. Byers & Anderson, Inc.**, 113 S.Ct. 2167 (1993)(court reporters job requires

no discretionary judgment, court reporters not entitled to absolute immunity as part of the judicial function); **Slavin v. Curry**, 574 F.2d 1256 (5th Cir. 1978)(prosecutorial function does not extend to supervision of trial transcript).

Finally, none of these alleged unlawful actions by Ritz could have occurred if this Respondent was not an indigent defendant-petitioner, as there would have been no court orders for Ritz to have allegedly countermanded if this Respondent a wealthy defendant-petitioner who would have been able to himself make the administrative and financial arrangements with the court reporters to produce for appellate purposes the Respondent's trial transcripts. Quite simply, Ritz would have never even been advised and/or informed of the production of the transcripts until Respondent filed such in the federal habeas corpus proceeding...then Ritz could argue in open court before a judge the legality of the transcripts in the federal habeas proceeding.[12] The contitutional guaranties of due process and equal protection assure Respondent the right to appellate review without invidious discrimination on account of Respondent's indigency. The Respondent's right to appeal from his conviction is the same as that of a person with financial means. **Griffin v. Illinois**, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; **Haines v. People**, 454 P.2d 595; Colo. Const. Art. II, Sec. 25; U.S.C.A. 14.

12/ It is axiomatic Ritz could not by any statute have opposed and/or interferred at the state trial court level in the postconviction proceedings; in the federal habeas corpus proceeding Ritz could only argue that 28 U.S.C. 2254 and Rule 5 Governing Section 2254 Cases did not provide the federal court the authority to consider these non-transcribed transcripts in regards to Respondent's exhausted speedy trial claim.

SUMMARY OF THE ARGUMENT

It is undisputed in the Colorado courts, and should be undisputed in this Court, that every person convicted of a crime is entitled as a matter of right to make application for post-conviction review alleging as this Respondent did in good faith, one or more of the grounds set forth under Rule 35(c)(2) of the Colorado Rules of Criminal Procedure. That determination by the Colorado legislative body cannot be disturbed by this Court. Further, it is well settled in this Court that when a State does grant as a matter of right this type of appellate review, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, as well as Article II, Section 25 of the Colorado Constitution, protect indigent persons like the Respondent from invidious discrimination during the course of a state and/or federal appeal.

The Colorado Attorney General's Office, the Petitioner, receive their power and duties from statutes alone and hold no common law powers. Under the circumstances of this case, Petitioner had no colorable authority at the state trial court level, and for this Court to extend absolute immunity to Petitioner for directing court reporters to violate their statutory duties and orders of court to (without discretion) produce Respondent's trial transcripts, would inevitably lead to authorized invidious discrimination by the State towards an indigent defendant-petitioner appealing his criminal conviction. The State, on the other hand, not being able to initiate these same procedures against a wealthy defendant-petitioner

appealing his criminal conviction.

A federal district court sitting in habeas corpus has the discretionary power to order the State to produce the non-transcribed portions of the state record for review of an exhausted speedy trial claim. The State, Petitioner here, and the court reporters have no discretion in producing these court ordered non-transcribed transcripts, with the prosecutorial function not extending to the supervision of the trial transcripts. Moreover, Petitioner was performing a reporter's function that did not require the exercise of discretionary judgment, and this ministerial and administrative task of producing a transcript not entitling Petitioner to immunity as part of the judicial function in the federal habeas corpus case. Since the decision of the Tenth Circuit Court of Appeals is in accord with this Court's sparing recognition of absolute immunity, extending it no further than its justification would warrant, this Court should not grant certiorari in this case.

ARGUMENT

I. PETITIONER'S ARGUMENT WOULD REQUIRE THIS COURT'S REVIEW OF COLORADO STATE LAW.

The Colorado legislative body has created as a matter of right a review of a person's criminal conviction under Rule 35 of the Colorado Rules of Criminal Procedure. And pursuant to specific Colorado statutes, C.R.S. 20-1-102(1)(a) and C.R.S. 20-1-201(c), it is the Office of the District Attorney who, in this case, represented the interests of the People of Colorado in the Respondent's Crim. P. 35 proceedings. The Office of the Attorney General re-

ceives their power and duties from statutes alone, C.R.S. 24-31-101, et seq., and under the circumstances of this case[13] the Office of the Attorney General was without any constitutional or statutory authority to allegedly countermand state court orders that required the court reporters to produce Respondent's trial transcripts.[14] **Jones v. District Court**, 780 P.2d at 529.(court reporter has a sworn duty to provide a transcript of the record to the party requesting it, and the order of the judge of the court not to produce it is of no excuse or justification whatever). The determination of Colorado law cannot be reviewed by this Court. **Jankovich v. Indiana Toll Road Commission**, 379 U.S. 487, 489 (1965). Given the breadth of Colorado laws as interpreted by the Colorado courts, in regards to decisions that the district attorney represents the interests of the People of Colorado in postconviction proceedings (**Tooley v. District Court In And For Second Judicial District**, Colo. 549 P.2d 775, citing **People v. District Court**, Colo. 549 P.2d 778), certiorari should not be granted by this Court to review these decisions.

Petitioner asserts that the Tenth Circuit's reasoning failed to address that as the advocate for the State of Colorado in the

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13/ In this case there was no order from the governor for Ritz to prosecute the Respondent's postconviction proceeding on behalf of the State; nor did the district attorney appoint Ritz as a special deputy district attorney in this matter.

14/ Below, Respondent alleged that Ritz countermanded Judge Steinhardt's order of March 22, 1991, then after Judge Hickman had issued other state court orders for the court reporters to produce Respondent's trial transcripts (3/25/92 and 6/01/92), the failure by the reporters to meet the court ordered deadlines was the result of Ritz's continual countermanding of this state court order.

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federal habeas corpus proceeding, Ritz's actions in regards to countermanding the state court orders for the court reporters to produce Respondent's transcripts, "were directed exclusively to the habeas corpus proceeding in her capacity as an advocate of the Office of the Attorney General for the State of Colorado", and the same considerations which underlie the extension of prosecutorial immunity to all other advocacy functions in criminal and civil proceedings of necessity extend to Ritz's advocacy function in the habeas corpus proceeding. Petition, pp. 10, 11.

The record below confirms that at the time of Respondent's motion for transcripts and Judge Steinhardt's order granting the motion and ordering the court reporters to produce Respondent's trial transcripts (March 1991), Respondent had pending before Judge Steinhardt two postconviction proceedings, a 35(b) and 35(c) proceeding for which these transcripts were applicable. In addition, Judge Steinhardt, who was totally familiar with Respondent's intentions of filing a Crim. P. 35(c) motion raising claims his appointed appellate counsel had refused to raise on direct appeal[15], also granted the motion for transcripts based upon its contents that these transcripts (non-transcribed) could be considered by the federal habeas court in regards to Respondent's exhausted speedy trial claim in the habeas corpus proceeding, and Respondent exhausting this transcript request in the state court. The request was made (for transcripts) as an adjunct to Respondent's substan-

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15/ Judge Steinhardt advised that Respondent, in his Crim. P. 35(c) motion to raise a claim of ineffective appellate counsel on direct appeal; appointed appellate counsel refusing to also have these at issue transcripts designated for the record on appeal.

allegations that demonstrated to Judge Steinhardt a need for these non-transcribed transcripts for review by the federal habeas court regarding Respondent's exhausted speedy trial habeas claim, as well as for the pending and proposed post-conviction proceedings in the state trial court. **Smith v. Bennett**, 365 U.S. 708 (1961)(having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial condition). See also Section 28 U.S.C. 2254(f) and Rule 5 Governing Section 2254 Cases.[16]

Even under the most generous interpretation of "advocacy", the Tenth Circuit Court of Appeals stated that"the actions at issue in this case are simply too far removed on the continuum from the core prosecutorial functions of initiating and pursuing criminal prosecutions to be covered by absolute immunity." Petition, Appendix A, pp. 4a, 5a. Stated alternatively, without any constitutional or statutory authority at the state trial court level, when allegedly countermanding state court orders for the reporters to produce Respondent's trial transcripts, Ritz was clearly acting outside the scope of her duties as an advocate for the Attorney General's Office in the federal habeas corpus proceeding and the progeny of **Imbler v. Pachtman**, 424 U.S. 409 (1976), not applicable in this case.

16/ Rule 5 sets forth the procedure for mechanically getting the record of the state court proceedings into the record of the federal habeas proceeding, while Section 2254(f) establishes the criteria for admissability in the federal court.

In the context of this case, Respondent was going to request the federal habeas court to consider the non-transcribed transcripts in regards to Respondent's exhausted speedy trial habeas claim. **Flamer v. Chaffinch**, 774 F.Supp. 211 (D.Del. 1991)(court on its own motion or upon request by petitioner may order that certain portions of the non-transcribed proceedings be transcribed and furnished). Even if the Respondent's speedy trial claim had not been exhausted and there was argument relating to this exhaustion issue, "state or district court must provide state records needed on exhaustion issue when pro se petitioner is unable to do so". **Duttry v. Petstock**, 878 F.2d 123, 124 (3d Cir. 1989).

Accordingly, Petitioner's argument that her advocacy function in the federal habeas proceeding superseded federal statutes and rules providing this Respondent the opportunity to have the federal court review the non-transcribed transcripts (that the federal court itself ordered produced) in regards to an exhausted speedy trial claim, is without any support at either the state court or federal court level.

II. IT IS UNDISPUTED BELOW AND IN THIS COURT AS WELL, THAT WHEN A STATE DOES GRANT AS A MATTER OF RIGHT A POSTCONVICTION REMEDY, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS INDIGENT PERSONS LIKE RESPONDENT FROM INVIDIOUS DISCRIMINATION IN THE APPELLATE PROCESS.

Petitioner cannot advance any meritorious argument that her alleged actions at issue here, the countermanding of state court orders for court reporters to produce Respondent's trial transcripts and disobeying a federal court order to have the court reporters

produce the non-transcribed transcripts to complete the record in the federal habeas corpus case, would have been accomplished if Respondent a "wealthy" defendant-petitioner instead of being indigent and unable to himself pay the reporters for producing the trial transcripts. Ritz could not have allegedly "countermanded" the state and federal court orders for the reporters to produce Respondent's trial transcipts if Respondent with the financial means to himself pay the court reporters to produce the transcripts...as in the case of a defendant-petitioner with the financial means to himself pay the reporters to produce trial transcripts, no court order is required. In the context of this case, as a result of Respondent's indigency, in order to have the State pay the reporters to produce the Respondent's trial transcripts, a court order was required and, in turn, Ritz provided the opportunity to discriminate against Respondent by allegedly "countermanding" state and federal court orders that required the reporters to produce Respondent's trial transcripts. This Court has repeatedly held "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." **Griffin v. Illinois**, 351 U.S. 12, 19, 100 L.Ed. 891, 76 S.Ct. 585. See also **Patterson v. Medberry**, 290 F.2d 275 (10th Cir. 1961). In **Bennett**, 365 U.S. at 709, 81 S.Ct. at 895, this Court stated:

> "To interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue his liberty is to deny that prisoner the equal protection of the laws."

Moreover, speaking for this Court in **Gardner v. California**,

393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969), Mr. Justice Douglas said:

> So long as this system of repeated hearings exists and so long as transcripts are available for preparation of appellate hearings in habeas corpus cases, they may not be furnished to those who can afford them and denied to those who are paupers.

Id., 393 U.S. at 369-370, 89 S.Ct. at 582-583.

Regarding the federal court order directed at Ritz to have the reporters produce the transcripts and complete the habeas record, the record below confirms Ritz "supervising" the production of the transcripts and producing only those transcripts she herself wanted filed in the federal habeas corpus proceeding. The other non-transcribed transcripts that the federal habeas court ordered produced[17] were the most pertinent and relevant transcripts in regards to the exhausted speedy trial claim in the habeas proceeding.[18] The record below also confirming that in regards to these transcripts Ritz did not produce as so ordered by the federal court, Respondent alleging that Ritz had instructed the court reporters to submit in the federal habeas proceeding false court documentation in regards to the actual scope of the record and the availability of specific transcripts. **(Exhibit B)** After stating in her

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17/ These same transcripts ordered produced by Judge Steinhardt's order of March 22, 1991; an order Ritz allegedly countermanded and instructed the reporters not to comply with Judge Steinhardt's order.

18/ Respondent's motion for transcripts specifically demonstrating exactly what transcripts were the most relevant to the speedy trial claims in the habeas case.

affidavit of January 6, 1992 that no hearings were held on the record on October 5, 1987, immediately after Respondent filed in the federal civil rights suit a motion to amend his complaint to add the court reporter as a defendant (July 20, 1992), the reporter transcribed her notes of this hearing held on October 5, 1987 on this same July 20, 1992 date. On August 4, 1992, this reporter then filing an affidavit stating these "clearly" marked notes had been in the possession of the other reporter. The other reporter having originally estimating the record for the 4 court hearings she was responsible as consisting of 300 pages of record and 120 days needed to transcribe her notes of these hearings. Yet after Judge Hickman's order of March 25, 1992, this reporter in 30 days filing 49 pages of transcripts regarding these 4 court hearings.[19] The record below showing that Respondent alleged Ritz instructed these court reporters to file and/or intentionally misrepresent to the federal court the actual availability of the transcripts, then after Judge Hickman's order of March 25, 1992, continuing to instruct the reporters to not comply with Judge Hickman's order.

The public interest demands strict adherence to judicial decrees, a federal court order directed to Ritz to have the reporters produce Respondent's trial transcripts, but a judicial decree Ritz blatently disregarded and allegedly requested the court reporters to the same. Ritz, as well as the court reporters had no discretion in "strictly" adhering to the federal court order to produce

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19/ These same transcripts ordered produced by Judge Steinhardt on March 22, 1991, with the record below indicating that this reporter agreeing to file such by July 1, 1991; Ritz alleged to have instructed this reporter not to produce these transcripts.

the Respondent's trial transcripts, and by failing to adhere to the court's order, Ritz cannot now claim absolute immunity for express dereliction of her duties as a court officer. **Valdez v. City And County Of Denver**, 878 F.2d 1285 (10th Cir. 1989). Because the decision of the Tenth Circuit Court of Appeals is in direct accord with all federal and state authority interpreting the right of an indigent to an appeal of his criminal conviction without invidious discrimination, certiorari should not be granted.[20]

III. A STATE ATTORNEY, WHEN PERFORMING THE FUNCTION OF A COURT REPORTER, IS NOT ENTITLED TO ABSOLUTE IMMUNITY.

First, this Court in **Antoine v. Byers & Anderson**, 113 S.Ct. 2167 (1993), ruled that the production of the transcript is not the product of independent judgment and does not involve decision making discretion, with court reporters not entitled to absolute immunity as part of the judicial function, citing **Imbler v. Pachtman**, supra. In **Antoine** this Court stating that court reporting is an administrative task for which absolute immunity is not applicable, citing **Forrester v. White**, 484 U.S. 219 (1988). The Fifth Circuit in **Slavin v. Curry**, 574 F.2d at 1264-65, holding that the prosecutorial function does not extend to the supervision of the transcripts. Under 28 U.S.C. 753(b) the word "shall" is a mandatory

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20/ In **White By Swafford v. Gerbitz**, 860 F.2d at 661,n.4, the Sixth Circuit would not extend absolute immunity to a prosecutor who failed to act timely in securing the plaintiff's release after being ordered by the court to work out the details of his release. In the case cited by Petitioner as being most closely analogous to this case at issue here, **Webster v. Gibson**, 913 F.2d 510 (8th Cir. 1990), the prosecutor there "initiating and pursuing a criminal prosecution", as opposed to an appeal at the state and federal levels.

connotation and the antithesis of discretion or choice. Thus, if a court reporter has no discretion in producing a trial transcript, Ritz as the "other individual designated (by the federal court) to produce the record", had no discretion but to produce the Respondent's trial transcripts. Cf. **Burns v. Reed**, 500 U.S.____,____, 111 S.Ct. 1934, 1944, 114 L.Ed.2d 547 (1991): "Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice..." The court reporters cannot claim absolute immunity for a failure to produce a trial transcript, **Antoine v. Byers**, supra, so it is quite obvious that Ritz cannot claim absolute immunity when acting in the role of a reporter. **Buckley v. Fitzsimmons**, 113 S.Ct. 2606 (1993). In addition, no case authority would suggest that a prosecutor at common law enjoyed absolute immunity for the supervision of the trial transcript. The production of verbatim record of proceedings was not an ordinary part of the judicial process prior to 1871; court reporting became commonplace only in the twentieth century. Hence, if there was no common law tradition of immunity for stenographers, Ritz cannot begin to prove a common law tradition of absolute immunity for her actions regarding the supervision and/or the production of the Respondent's trial transcripts. To the contrary, court employees could be held liable for failure to provide timely transcripts. **E.g., Bates v. Foree**, 67 Ky. (4 Bush) 430 (1868) (clerk charged with providing transcript could be liable on bond).

Finally, Petitioner's affidavit filed in the federal civil rights suit, Petition, Appendix G, pp. 2g, 3g, contained other statements of material facts that subsequently were alleged by Respondent as being knowing false statements of material facts. Specifically, paragraphs 16, 19, and 23. **(Exhibit C)** Although Ritz's sworn statement that after her conversations with Reporter Heymans (Nov.'91/Judge Carrigan's Order), Reporter Heymans prepared a transcript of the hearing held in Division 11 on November 13, 1987, and she certified that she could find no record of any proceeding held on October 5, 1987 (para. no. 16), Reporter Heymans had actually prepared this November 13, 1987 transcript on June 14, 1991, pursuant to Judge Steinhardt's order.[21] **(Exhibit D)** In regards to whether Ritz was advised of Judge Steinhardt's order prior to Judge Hickman's telephone call of March 24, 1992 (para. nos. 19, 23), the record clearly indicated these statements found no support within specific court documentation. **(Exhibit E).** And after reviewing these Exhibits, C, D, and E, it is no great surprise that Petitioner only included specific portions of her affidavit, and set forth only paragraphs 3-6 of a status report and motion for reconsideration (filed before Judge Carrigan on January 15, 1992). Petition, pp. 3, 4. A review of the complete status report and motion, **(Exhibit B)**, would again indicate that Ritz

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21/ Below the Respondent alleging that at the request and/or instructions of Ritz, Ms. Heymans not filing this transcript on or about July 1, 1991 as she had agreed would be the filing deadline regarding Judge Steinhardt's order. Subsequently, after Judge Carrigan's order of November 8, 1991, this transcript produced by Ritz as though prepared by Ms. Heymans pursuant to Judge Carrigan's order.

was advised of the existing state court order (Judge Steinhardt's order of March 22, 1991) as so confirmed by Ritz's statement in para. no. 1 that reads:

> 1. On November 7, 1991, the Petitioner moved to complete the record in this case. The Petitioner had examined the record and determined that several transcripts were missing, which he apparently had requested in the course of the state proceedings. (emphasis supplied)
>
> 2. On November 14, 1991, the Respondents were ordered to supply the transcripts of the hearings requested by the Petitioner.

Paragraph No. 2 confirming that Ritz, as the respondent there, was ordered by Judge Carrigan to supply these non-transcribed transcripts. Yet as so shown above in this opposition brief, Ritz did not oppose and/or request Judge Carrigan reconsider his order in regards to the other filed (July 19, 1991) non-transcribed transcribed transcripts, with Ritz producing the November 13, 1987 transcript along with this status report and motion for reconsideration. The only non-transcribed transcripts Ritz opposed and allegedly had the reporters submit false court documentation regarding the availability of these transcripts, were the most pertinent and relevant non-transcribed transcripts.[22]

In **McCray v. State of Maryland**, 456 F.2d 1, 3 (4th Cir. 1972) the court said:

> "....Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role to the judicial system."

See also the order of this Court denying application for mandamus and

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22/ Ritz could not have accomplished this act, and/or attempted to prevent these transcripts from being filed in the federal habeas proceeding if Respondent with the financial means to have himself paid the reporters to produce these transcripts.

certiorari in **Garrison v. Brown**, 405 U.S. 985 (1972). There was a statutory requirement, 28 U.S.C. 753(b), for Ritz to produce the Respondent's transcripts as ordered by the federal habeas court pursuant to 28 U.S.C. 2254(f) and Rule 5 Governing Section 2254 Cases. Ritz's "supervision" of the trial transcripts, and Ritz's act of herself determining what non-transcribed transcripts were to be made part of the habeas record, have never been part of the **Imbler** progeny as extending immunity to the dereliction of express statutory duties and court orders directly contravenes public policy and undermines the essence of the rule of law. Even more so in this case, as this Respondent was an indigent defendant-petitioner who was subject to on-going discrimination and unlawful acts on appeal solely as a result of his indigency.

CONCLUSION

Being forced to appeal without a transcript creates an inherent risk of error and prejudice. The transcript-not the production of it-is essential to the appellate process. The judicial system should place a premium on enforcement of rules that enhance the administration of justice. Obedience to court orders is crucial to the smooth functioning of the courts. Just as public policy does not support immunity, neither does history. The Court has refused to grant immunity under 1983 where there was no historical or early common law recognition of such immunity...and court reporters did not enjoy absolute immunity under early common law. Accordingly, Petitioner in the role of a court reporter cannot claim absolute immunity.

Thus, Petitioner has not advanced any basis under S.Ct.R. 10 for this Court to exercise its discretion in granting review on writ of certiorari, and the petition should therefore be denied.

DATED: January 10, 1994.

Respectfully submitted,

Cary James Gagan
Pro Se
U.S.P.O./General Delivery
Cherry Creek Station
Denver, Colorado 80206
(303) 832-4091

No.94-1076

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WENDY RITZ, IN HER INDIVIDUAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Petitioner,

v.

CARY JAMES GAGAN,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX

Page

EXHIBIT A

Federal Public Defender's correspondence regarding the dilema created by the transcript delay(s).....A1

Federal Public Defender's correspondence regarding the Magistrate's holding the habeas case in abeyance pending resolution of Rule 35(c) motion.....2a

Response to Court's Order regarding habeas corpus procedures as a result of the transcripts delay(s).....3a-10a

Order of state court dismissing Rule 35(c) motion for a failure of counsel to file a memorandum in support of Respondent's 35(c) claims.....11a

Order of the Colorado Court of Appeals reversing (in part) and remanding with directions the state court's dismissal of Respondent's 35(c) motion.....12a

EXHIBIT B

In its entire form the Status Report and Motion For Reconsideration of Order to Produce the Transcripts.....B1-2b

Affidavit by Reporter Heymans regarding availability of transcript (Oct.5'87) ordered produced by Judge Steinhardt and Judge Carrigan (submitted at request of Ritz)...3b

Certificate of Reporter (Heymans) dated July 20, 1992, showing that October 5, 1987 transcript was available and held on the record.....4b

Affidavit of Reporter Heymans stating notes of October 5, 1987 hearing in possession the entire time of Reporter Hibbard.....5b

Payment voucher for Reporter Hibbard for 45 pages of transcripts that Ritz stated in "Status Report" would be 300 pages of record for the same 4 court hearings that had already been ordered produced by Judge Steinhardt.....6b

Notice of Record Certified To the Appellate Court on July 23, 1992, or one year after the original deadline set by the Reporters themselves had expired.....7b-8b

Complete Response To Status Report filed by Respondent's appointed habeas counsel.....9b-10b

APPENDIX (Continued)

Page

EXHIBIT C

Petitioner's omitted portion of her affidavit.....C1-2c

EXHIBIT D

Certificate of Reporter (Heymans) confirming that the November 13, 1987 transcript was transcribed on June 14, 1991 (pursuant to Judge Steinhardt's Order).....D1

EXHIBIT E

State court documentation served on Ritz advising Ritz of Judge Steinhardt's Order.....E1

Stamped as Received by the Office of the Attorney General the copy of the state court documentation advising Ritz of Judge Steinhardt's Order.....2e

First page of Respondent's correspondence (May 16, 1991) to Ritz again advising Ritz of Judge Steinhardt's order...3e

Respondent's (pro se) Response to Ritz's Status Report that was served by Respondent on Ritz again informing Ritz of Judge Steinhardt's Order (first page only).....4e

APPENDIX A

Office of the
FEDERAL PUBLIC DEFENDER
DISTRICTS OF COLORADO AND WYOMING
999 18th Street, North Tower, Suite 207
Denver, CO 80201

Michael G. Katz
Federal Public Defender
Charles Szekely
Chief, Trial Division
Vicki Mandell-King
Chief, Appellate Division

(303) 294-7002
FTS 330-7002
FAX 294-1192
FTS FAX 330-1192

April 15, 1992

Cary Gagan
1791 South Filbert Court
Denver, CO 80222

Dear Cary:

As you can see by the enclosed motion, I have done quite a bit of research and given a lot of thought to the dilemma in which we find ourselves. Please call so that we can set up another meeting. Also, please leave a phone number at which we can reach you as neither Caroline nor I know of a present phone number.

Very truly yours,

VICKI MANDELL-KING
Assistant Federal Public Defender
Chief, Appellate Division

VMK:ldw

Office of the
FEDERAL PUBLIC DEFENDER
DISTRICTS OF COLORADO AND WYOMING
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Charles Szekely
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Vicki Mandell-King
Chief, Appellate Division

(303) 294-7002
FTS 330-7002
FAX 294-1192
FTS FAX 330-1192

May 29, 1992

Cary Gagan
1791 South Filbert
Denver, CO 80222

Dear Cary:

Enclosed is a copy of Magistrate Borchers' order, holding your case in abeyance, pending resolution of your state Rule 35 motion. As you know, in my motion, to which this order is a response, I had indicated a request to amend the habeas petition with unexhausted claims under the circumstances that would not result in dismissal. My interpretation of this order is that the magistrate is hopeful you will be able to exhaust the claims which ideally you would like to add to this habeas petition prior to completing your parole and thus no longer being in custody.

I appreciate your calling me every week since you do not have a phone number at which I can reach you. Please continue to keep me advised of the developments in the state case.

Very truly yours,

VICKI MANDELL-KING
Assistant Federal Public Defender
Chief, Appellate Division

VMK:ldw

enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

v.

FRANK GUNTER, et al.,

Respondent.

RESPONSE TO COURT'S ORDER OF FEBRUARY 10, 1992
AND ADDITIONAL REQUESTS

Cary Gagan, by undersigned counsel, for his response to the Court's order of February 10, 1992, states to the Court as follows:

Background in Current Federal and State Cases

As this Court is aware, on January 7, 1991, Mr. Gagan filed pro se his habeas petition in this Court. In that petition he asserts denial of bail, violation of speedy trial, and denial of counsel. Respondents filed an answer to show cause on February 11, 1991. On May 10, 1991, the Federal Public Defender's Office was appointed to represent Mr. Gagan.

On January 29, 1992, this Court ordered that a telephone conference be held on February 4, 1992. During that conference undersigned counsel advised the court of Mr. Gagan's pending Rule 35(c) motion, and that such action may affect the proceedings in federal court. In an order filed on February 10, this Court

ordered that additional time is granted up to and including April 15, 1992 for Petitioner to file any Supplemental Petition or Traverse.

On April 1, 1992, this Court issued an order that counsel advise whether additional transcripts are needed and whether a hearing should be set. On April 10, 1992, Mr. Gagan responded to the Court's order, stating it would be necessary to review additional transcripts in order to file a comprehensive Supplemental Memorandum/Traverse.

On or about August 30, 1991, Mr. Gagan filed pro se in Arapahoe County a Rule 35(c) motion, claiming, inter alia, ineffective assistance of counsel on appeal, variance between the charge and proof, and improper amendment of the information. Terri Harrington was appointed to represent him in December 1991. No memorandum has yet been filed in support of his motion. An evidentiary hearing has not yet been set. That case, like this habeas action, has been complicated and delayed due to the problems in identifying, locating and preparing necessary transcripts. On March 25, 1992, the state court ordered additional transcripts to be filed in thirty days. Ms. Wendy Ritz has advised this Court that those transcripts will be made available to supplement the record in this case.

Mr. Gagan informed counsel he would complete parole supervision in a few months. Contact with the Denver Parole Office indicates he will not be discharged until February 10, 1993,

although that date may be advanced due to calculation of good time to December 1992 or January 1993.

Discussion of Dilemma

The facts that Mr. Gagan is pursuing state and federal relief at the same time, that some but not all claims are ripe for habeas habeas review, and that Mr. Gagan will soon complete his parole term create a procedural dilemma. The dilemma is set forth below.

To amend the pending petition for habeas corpus relief to include additional claims which have not been exhausted in state court would render Mr. Gagan's petition mixed and subject to dismissal under Rose v. Lundy, 455 U.S. 509, 510 (1982); Landano v. Rafferty, 897 F.2d 661, 668 (3rd Cir.), cert. denied, 111 S.Ct. 46 (1990); Johnson v. Lewis, 929 F.2d 460, 464 (9th Cir. 1991); O'Bremski v. Maass, 915 F.2d 418 (9th Cir.1990), cert. denied, 111 S.Ct. 986 (1991)(habeas petition should be dismissed if state remedies are not exhausted as to any of the federal claims.)

However, the exhaustion requirement is a matter of comity and is not jurisdictional. Prather v. Rees, 822 F.2d 1418 (6th Cir. 1987); Snethen v. Nix, 736 F.2d 1241 (8th Cir. 1984), appeal after remand, 885 F.2d 456, cert. denied, 110 S.Ct. 3223 (1990). Jurisdiction is a matter of satisfying the statutory "in custody" requirement. Harrison v. State of Indiana, 597 F.2d 115 (7th Cir. 1979); Bufalino v. Reno, 613 F.2d 568 (5th Cir. 1980)(exhaustion rule does not relate to jurisdiction of federal court but rather

addresses the appropriate exercise of jurisdiction in light of the American system of dual sovereignty).

Mr. Gagan's claim in state court of ineffective assistance of counsel on appeal is subject to the exhaustion requirement. Simmons v. Wainwright, 585 F.2d 95 (5th Cir. 1978). Where a petitioner has filed a collateral attack in state court raising ineffective assistance on appeal which is still pending, the principle of comity would be violated by considering that claim in the habeas action. Horowitz v. Wainwright, 709 F.2d 1403 (11th Cir. 1983). This is Mr. Gagan's situation at the present time.

If Mr. Gagan does not amend the instant petition with the unexhausted claims, it is possible that his subsequent habeas petition could be barred as an abuse of the writ. Rose v. Lundy, 455 U.S. at 521; Lundy, Id. at 538 (White, J., concurring in part and dissenting in part)("[I]f the [district] judge rules on those issues that are ripe and dismisses those that are not, I would not tax the petitioner with abuse of the writ if he returns with the latter claims after seeking state relief."); Powell v. Spalding, 679 F.2d 163, 166 (9th Cir. 1982)(petitioner would be able to refile unexhausted claims in a second petition if he chose to do so)(dictum); Tyler v. Armontrout, 917 F.2d 1138, 1141 (8th Cir. 1990)(petitioner who had proceeded in an earlier petition with only his exhausted claim and had deliberately set aside his unexhausted claims abused the writ when he raised the previously unexhausted claims in a subsequent petition); Rudolph v. Blackburn, 750 F.2d

302, 305 (5th Cir. 1984)(sole fact that petitioner's claim for relief was not exhausted at time of prior federal writ would not excuse failure to include that claim in the prior petition); Jones v. Estelle, 722 F.2d 159, 169 (5th Cir. 1983), cert. denied, 460 U.S. 976 (1984)(petitioner who persists in the prosecution of the federal writ of habeas corpus while aware of additional but unexhausted claims faces the burden of disproving abuse of the writ; that the omitted claim was not exhausted at the time of the first petition is not sufficient to avoid the abuse doctrine); Jones v. Hess, 681 F.2d 688, 695 (10th Cir. 1982)(petitioner who deletes unexhausted claim risks forfeiture of future consideration of that claim as a successive petition); Smith v. Atkins, 678 F.2d 883, 884 (10th Cir. 1982). In Neuschafer v. Whitley, 860 F.2d 1470, 1475, 1476 n. 9-10. (9th Cir. 1988), cert. denied, 110 S.Ct. 264 (1989), the court held that a petitioner does not deliberately abuse the writ if he leaves claims out of a previous petition because he believed in good faith that his claim would be barred until he had exhausted state remedies, and he brings the claims in a later petition after exhausting state remedies. See also, McCleskey v. Zant, 111 S.Ct. 1454 (1991); Worthen v. Kaiser, 952 F.2d 1266 (10th Cir. 1992).

The claim of successive petition can be raised by the state or the Court. Matthews v. Butler, 833 F.2d 1165 (5th Cir. 1987). In Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983), cert. denied 466 U.S. 976 (1984), the court held that where a petitioner is

represented by counsel in an earlier writ, the court considers what petitioner was aware of and counsel's competency in determining abuse of the writ. The Tenth Circuit reached the merits of a third petition in Coleman v. Saffle, 912 F.2d 1217 (10th Cir), cert. denied 111 S.Ct. 22 (1990) See, Paprskar v. Estelle, 612 F.2d 1003 (5th Cir.), cert. denied, 449 U.S. 885 (1980) (second petition did not constitute abuse where, at time of earlier petition, allegations raised in second petition had not been finally acted upon by the state court and were unexhausted).

Dismissal of the present petition without prejudice to refile when Mr. Gagan has exhausted state remedies on his additional claims is not a viable alternative. Rule 41, F.R.C.P, which authorizes voluntary dismissal is not applicable to dismissal of a first petition in order to not have any procedural prejudice attach to those claims. Potts v. Zant, 638 F.2d 727 (5th Cir.), reh. denied, 642 F.2d 1210, cert. denied, 454 U.S. 877 (1981). See also, Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989)(dismissal without prejudice does not constitute a determination on the merits and does not bar a subsequent habeas corpus petition).

Finally, were Mr. Gagan to delay amending his petition until he has exhausted his state remedies, he will no longer satisfy the "in custody" requirement. Section 2254(a), 28 U.S.C., provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only

> on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The "in custody" requirement, unlike exhaustion, is jurisdictional. Gonzales v. Stover, 575 F.2d 827 (10th Cir. 1978) (power of the federal courts to grant habeas corpus relief is available only to persons who are in custody.) In Gamble v. Parsons, 898 F.2d 117 (10th Cir.), cert. denied,111 S.Ct. 212 (1990), the court held the petitioner was in custody even though the challenged conviction had been fully discharged, where petitioner was currently in custody on conviction which had been enhanced by the expired conviction; the petitioner could challenge the present sentence to the extent it had been enhanced by the allegedly invalid prior conviction. See also, Bailey v. Cowley, 914 F.2d 1438 (10th Cir. 1990). But see, Flittie v. Solem, 853 F.2d 597 (8th Cir. 1988)(district court lacked jurisdiction over habeas petition challenging conviction for which petitioner was no longer incarcerated, but which was used to enhance the sentence he was currently serving; the effect of the conviction was a collateral consequence which did not give rise to jurisdiction to grant habeas relief.)

RELIEF REQUESTED

First, Mr. Gagan requests permission to file the Supplemental Memorandum after additional transcripts are filed to complete the record in this case.

Second, Mr. Gagan requests that this Court hold this case in abeyance pending a resolution of his Rule 35(c) matter. Such action by this Court would be consistent with principles of comity. Also, were Mr. Gagan to prevail in his Rule 35(c) motion, this habeas petition would be moot.

Third, Mr. Gagan requests the opportunity prior to completion of his parole term to amend this habeas petition to include claims raised in the Rule 35(c) motion. It is unlikely Mr. Gagan will be able to exhaust further state remedies prior to completion of his parole term. Therefore, given that the exhaustion requirement is not jurisdictional, the possibility of abuse of the writ, and his custody status, Mr. Gagan requests that this Court allow inclusion of non-exhausted claims in this petition without dismissal as a mixed petition.

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender

VICKI MANDELL-KING
Assistant Federal Public Defender
Chief, Appellate Division
999 - 18th Street
Suite 207, North Tower
Denver, Colorado 80202
(303) 294-7002

DISTRICT COURT, COUNTY OF ARAPAHOE, COLORADO
Case No. 86 CR 451, Division 11

ORDER

PEOPLE OF THE STATE OF COLORADO, Plaintiff

V.

CARY JAMES GAGAN, Defendant.

This matter is before the Court on the Defendant's Motion to reconsider the Court's order denying Defendant's Motion to Vacate the Judgment and Sentence. The Court has Reviewed the Motion and the entire record in this case and finds that appointed counsel has not filed any pleadings corroborating or supporting Defendant's contentions. Judge Steinhardt never determined that Defendant's August 1991 Motion to Vacate Judgment and Sentence had merit. Based on this Court's review of the record no hearing is necessary to determine the Motion to Vacate Judgment and Sentence. The Motion to Vacate Judgment and Sentence is denied. The request for hearing is denied.

DONE and signed in open court this 2d day of November, 1992.

BY THE COURT:

Deanna E. Hickman

DEANNA E. HICKMAN
District Court Judge

Appeal from the District Court of Arapahoe County State of Colorado, to the Colorado Court of Appeals. Opinion issued & judgment entered March 17, 1994 before Ruland, Hume and Kapelke, JJ.

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
(303) 837-3785

MANDATE

Court of Appeals No. 92CA2009
Trial Court No. 86CR451 and 86CR539

PEOPLE V CARY J. GAGAN

This cause came on to be heard on the record on appeal from the District Court of Arapahoe argued by counsel. On consideration thereof, it is ordered that the Order of said Court is AFFIMRED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS.

Date: June 30, 1994

Patrick H. Stanford
Clerk of the Court

By: Catherine Cunningham
Deputy Court Clerk

COPIES MAILED TO
COUNSEL OF RECORD
Tri. Ct. Judge ~~Tri. Ct. Clerk~~
AND Pro Se
ON 6-30-94
BY a
COLORADO COURT OF APPEALS

COURT OF APPEALS
STATE OF COLORADO
Certified to be a full, true and correct copy
Date 6-30-94
Clerk of Court of Appeals
By C Cunningham
Deputy Clerk

SEAL
COLORADO

APPENDIX B

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

92 JAN 15 P3:05

JAMES R. MANSPEAKER, CLERK
BY _____ DEP. CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

vs.

FRANK GUNTER AND ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Respondents.

STATUS REPORT ON AVAILABILITY OF TRANSCRIPTS REQUESTED BY PETITIONER AND MOTION FOR RECONSIDERATION OF ORDER TO PRODUCE THE TRANSCRIPTS

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1. On November 7, 1991, the Petitioner moved to complete the record in this case. The Petitioner had examined the record and determined that several transcripts were missing, which he apparently had requested in the course of the state proceedings (Exhibit A).

2. On November 14, 1991, the Respondents were ordered to supply the transcripts of the hearings requested by the Petitioner (Exhibit B).

3. The Respondents tracked down the court reporters who recorded these hearings and discovered that the transcripts requested were never transcribed as part of the state court proceedings. Thus, they were not part of the record reviewed by the state courts.

4. Given the unique circumstances of this case, the Respondents now ask this Court to reconsider its order to produce the records, and relieve Respondents of the responsibility to produce the transcripts by discharging that order.

5. The Petitioner's attack on his state court convictions is based in part on a record that was never made available to the Colorado Court of Appeals. This constitutes a failure to exhaust state remedies as well as an unacceptable bypass of the state judicial system. The Petitioner's procedural default in not pro-

viding these transcripts to the Colorado courts bars federal courts from considering these transcripts absent a showing of cause and prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982). Therefore, it is the Respondents' position that the additional transcripts are not necessary for resolution of this case, and should not be considered by this Court.

6. If this Court should nonetheless determine that the requested transcripts are necessary for its consideration of this case, the Respondents request that this Court pay for preparation of the transcripts. Since the Petitioner requested the transcripts he should pay for them; however, he is indigent.

7. Kathleen Ozog Heymans has prepared a transcript of the hearing held in Division 11 on November 13, 1987, 8 pages @ $2.00 per page, for a cost of $16.00 (Exhibit C). In addition, Ms. Heymans certifies that after reviewing her notes of October 5, 1987, she can find no record of any proceedings in this case on that date (Exhibit D). Janice Hibbard reported the hearings on July 22, 1987; July 24, 1987; September 15, 1987; and September 18, 1987. Ms. Hibbard estimates that there are 300 pages of record to be transcribed, and that she will need approximately 120 days to complete the transcripts.

GALE A. NORTON
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

JOHN DANIEL DAILEY
Deputy Attorney General

ROBERT MARK RUSSEL
First Assistant Attorney General

Wendy J. Ritz

WENDY J. RITZ, 17024
Assistant Attorney General
Appellate Section

Attorneys for Respondents

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

Case No. 87CV1477

REPORTER'S AFFIDAVIT

CARY JAMES GAGAN,

Petitioner,

vs.

PATRICK SULLIVAN, SHERIFF OF ARAPAHOE COUNTY,

Respondent.

I, Kathleen Ozog Heymans, hereby certify that on October 5, 1987, I was the Official Shorthand Reporter of Division 5 of the Arapahoe County District Court, Judge John P. Leopold presiding, and hereby certify that after a review of my docket for October 5, 1987, and a careful review of my notes from that date, that I can find no record of any proceedings held on the record in the above-captioned case on October 5, 1987.

Dated this 6th day of January, 1992.

Kathleen Ozog Heymans

Kathleen Ozog Heymans, CSR, RPR

Sworn before me this 6 day of JANUARY, 1992.

Clerk of the District Court

My commission expires _____.

Clerk of the District Court

DISTRICT COURT SEAL ARAPAHOE COUNTY, COLORADO

CERTIFICATE OF REPORTER

THIS IS TO CERTIFY that, I, Kathleen Ozog Heymans, Certified Shorthand Reporter within and for the State of Colorado, Registered Professional Reporter, Official Reporter for Division Five of the District Court of the 18th Judicial District, sitting in Englewood, Colorado, was present at the time of the hearing on October 5, 1987, in the case set forth in the caption hereto; that I took down in Stenotype all of the proceedings; that my notes of the said hearing were reduced to typewriting by me using computer-aided transcription; and that the foregoing pages do contain and constitute a full, true, and correct transcript of those proceedings.

SIGNED this 20th day of July, 1992, at Englewood, Colorado.

Kathleen Ozog Heymans, CSR

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO
Case No. 86CR539

REPORTER'S AFFIDAVIT

PEOPLE OF THE STATE OF COLORADO,
vs.
CARY GAGAN,
Defendant.

I, Kathleen Ozog Heymans, official reporter in the Arapahoe County District Court, hereby state that on an unknown date a request for a transcript of a hearing held October 5, 1987, in the above-entitled case was forwarded to me.

A careful search was done by me of the notes stored in Division 5 from that date. I went through these notes approximately three times, fold by fold. No record from said proceedings were found and I accordingly filed an affidavit dated January 6, 1992.

On July 15, 1992, Ms. Joanne Keim, Deputy Clerk, forwarded to me an envelope postmarked July 13, 1992, from Reporter Janice Hibbard containing notes from October 5, 1987, which had been stored in Division 2 and were in Ms. Hibbard's possession for a period of time unknown to myself. These notes were clearly marked that I was the reporter of certain Division 2 proceedings held on that date and those proceedings included the hearing in the above-entitled case.

This reporter interrupted work on other transcripts to prepare the transcript from these notes and the transcript was completed and turned in to Ms. Keim within approximately one week after I was aware of the existence of the notes.

Dated this 4th day of August, 1992.

Kathleen Ozog Heymans
Kathleen Ozog Heymans, CSR, RPR

Sworn before me this 4th day of August, 1992.

DISTRICT COURT SEAL

Deputy Clerk

My commission expires _____.

Filed
MAY 20 1992
EILEEN M. MANNING
CLERK OF DISTRICT COURT
ARAPAHOE COUNTY, COLORADO

Pay to: Janice Hibbard
6040 Locust St.
Commerce City, Co
80022

SS# 524-56-6326

TO: Clerk of the Dist Ct.

RE: People v. Cary Gagan
86 CR 539
& 86 CR 451

Ordered by: Ct. Appt Counsel

Voucher For Payment

July 22, 1987 21 pgs @ 2.00	42.00
July 27, 1987 5 pgs @ 2.00.	10.00
Sept. 15, 1987 13 pgs @ 2.00	26.00
Sept. 18, 1987 6 pgs @ 2.00	12.00
Total due →	$90.00

Ok to pay - order previously entered by Judge
JSS 5-11-92
deh.

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO

Case No. 86CR539 U. S. District Court Case No. 91-C-0005

NOTICE OF RECORD CERTIFIED TO THE APPELLATE COURT

PEOPLE OF THE STATE OF COLORADO

Plaintiff

vs.

CARY JAMES GAGAN

Defendant

You and each of you will take notice that the record in the above entitled action has been duly certified and (mailed to ~~XXXXXXXX~~) the office of the Clerk of the U. S. District Court on the 23rd day of July, 1992 A.D.

Date: July 23, 1992

EILEEN M. MANNING
Clerk of the District Court
7325 So. Potomac
Englewood, CO 80112

By: Joanne M. Kern
Deputy Clerk

cc: Office of the Attorney General
Attorney for Plaintiff
Appellate Division
110 - 16th St.
Denver, CO 80202

cc: Terri Harrington
Attorney for Defendant
1623 Washington St.
Denver, CO 80203

Cary James Gagan
1791 So. Filbert St.
Denver, CO 80222

People v. Gagan
86CR539
91-C-0005

INDEX OF RECORD

Volume 1	Trial Court Record - Supplemental	Page No.
	Placita	001
	Index	002
	Certificate of Judge	003
Volume 2	Reporter's Transcript of Jury Trial on 8/31/87 Before Judge Hunter D. Hardeman	1 thru 20
Volume 3	Reporter's Transcript of Hearings on 7/22/87 Before	1 thru 21
	Judge John P. Gately; 7/27/87 Before Judge Joseph	1 thru 5
	Lewis; 9/15/87 and 9/18/87 Before Judge James C.	1 thru 13
	Flanigan	1 thru 6
Volume 4	Reporter's Transcript of Hearing on 10/5/87 Before Judge John P. Leopold	1 thru 13

96

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

92 JAN 23 P4:37

JAMES R. MANSPEAKER CLERK
BY _____ DEP. CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

v.

FRANK GUNTER AND ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Respondents.

RESPONSE TO STATUS REPORT

Petitioner Gagan, by undersigned counsel, responds to the status report filed by Respondents as follows:

1. The status report informs the Court of the availability and cost of transcripts and also states that these transcripts were not available to the Colorado Court of Appeals and constitute a "failure to exhaust state remedies" and a "procedural default."

2. This case has already been delayed considerably, due to an initial inability to locate portions of the record which were reviewed by the Court of Appeals and counsel's schedule. Counsel is attempting to prepare the supplemental memorandum scheduled to be filed on February 7. Once that is prepared, counsel may be better able to respond to the allegation of procedural default. The record as presently constituted reflects Mr. Gagan was found to be incompetent for a period of time, he proceeded to trial pro se, and the trial was held in his absence. Mr. Gagan filed his appeal pro se and has experienced one frustration after another in obtaining full review of his claims. These facts will have bearing on the claims raised by Mr. Gagan as well as Respondents' claim of procedural default concerning the transcripts.

3. Counsel suggests that the Court order preparation and filing of the requested transcripts. Once the record is complete, the Court can better decide what transcripts are appropriate for the Court to consider in ruling on the merits.

4. When counsel made the request to supplement the record, counsel was unaware that certain transcripts had not ever been prepared. In terms of arranging payment for transcripts, counsel

EXHIBIT

will be happy to prepare the necessary transcript order forms and CJA vouchers. Under such procedure, when such vouchers are approved, payment is made from the Court's budget.

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender

Vicki Mandell-King

VICKI MANDELL-KING
Assistant Federal Public Defender
999 - 18th Street
Suite 207, North Tower
Denver, Colorado 80202
(303) 294-7002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE TO STATUS REPORT was furnished to Wendy J. Ritz, Assistant Attorney General - Appellate Section, 110 - 16th Street, 10th Floor, Denver, CO 80202 on this the 28th day of January, 1992.

L. Winkler

APPENDIX C

14. Having learned that parts of the record had not yet been transcribed, I tracked down Kathleen Ozog Heymans and Janice Hibbard, the court reporters assigned to the different hearing dates.

15. Neither Ms. Heymans, Ms. Hibbard nor any other court reporter advised me of Chief Judge Steinhardt's Order, or of any existing state court order pertaining to Gagan's transcripts. My conversations with the court reporters were focused on Judge Carrigan's Order.

16. After my conversation with Ms. Heymans, she prepared a transcript of the hearing held in Division 11 on November 13, 1987; and she also certified that she could find no record of any proceeding held on October 5, 1987.

17. Ms. Hibbard pulled her notes and advised me that she had reported the hearings on July 22, 1987, July 24, 1987, September 15, 1987, and September 18, 1987. I informed Ms. Hibbard that the respondents in Civil Action No. 91-C-0005 were going to ask the federal court to reconsider its order requiring production of the transcripts and I asked her to wait to transcribe the hearings until the issue was resolved.

18. My conversations with Ms. Hibbard concerned only the federal court order. Ms. Hibbard did not mention the state court order to me.

19. I did not instruct Ms. Hibbard to not comply with Judge Steinhardt's Order. Indeed, I did not know about Judge Steinhardt's Order.

20. On January 15, 1992, I filed a "Status Report on Availability of Transcripts Requested by Petitioner and Motion for Reconsideration of Order to Produce the Transcripts in Civil Action No. 91-C-0005" which states in part:

> 3. The Respondents tracked down the court reporters who recorded these hearings and discovered that the transcripts requested were never transcribed as part of the state court proceedings. Thus, they were not part of the record reviewed by the state courts.
>
> 4. Given the unique circumstances of this case, the Respondents now ask this Court to reconsider its order to produce the records, and relieve Respondents of the responsibility to produce the transcripts by discharging that order.
>
> 5. The Petitioner's attack on his state court convictions is based in part on a record that was never made available to the Colorado Court of Appeals. This

constitutes a failure to exhaust state remedies as well as an unacceptable bypass of the state judicial system. The Petitioner's procedural default in not providing these transcripts to the Colorado courts bars federal courts from considering these transcripts absent a showing of cause and prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982). Therefore, it is the Respondents' position that the additional transcripts are not necessary for resolution of this case, and should not be considered by this Court.

6. If this Court should nonetheless determine that the requested transcripts are necessary for its consideration of this case, the Respondents request that this Court pay for preparation of the transcripts. Since the Petitioner requested the transcripts he should pay for them; however, he is indigent.

This "Status Report on Availability of Transcripts Requested by Petitioner and Motion for Reconsideration of Order to Produce the Transcripts" is attached as Exhibit G to the "Complaint 42 U.S.C. 1983".

21. As of March 24, 1992, this Court had not ruled on the "Motion for Reconsideration of Order to Produce the Transcripts" in Civil Action No. 91-C-0005.

22. On March 24, 1992, I received a telephone call from Judge Deanna E. Hickman of the District Court in Arapahoe County. Judge Hickman informed me that there was an existing state court order for the preparation of transcripts requested by Mr. Gagan which I had "countermanded".

23. I did not know of Judge Steinhardt's Order, or any existing state court order, until Judge Hickman called and told me.

24. After learning of the state court order, I filed a "Motion to Withdraw Motion for Reconsideration of Order to Produce Transcripts" in Civil Action No. 91-C-0005 on March 30, 1992.

25. Because Ms. Norton is the Attorney General for the State of Colorado, her name appears on pleadings and documents filed by the Attorney General's Office in state and federal court cases in which the Attorney General's Office appears on behalf of a party. Thus, Ms. Norton's name appears on the documents filed in Civil Action No. 91-C-0005.

26. As a result of the large volume of cases handled by the Attorney General's Office, Ms. Norton cannot personally supervise, or participate in, each case.

APPENDIX D

CERTIFICATE OF REPORTER

THIS IS TO CERTIFY that, I, Kathleen Ozog Heymans, Certified Shorthand Reporter within and for the State of Colorado, Registered Professional Reporter, Official Reporter for Division Eleven of the District Court of the 18th Judicial District, sitting in Englewood, Colorado, was present at the time of the hearing on November 13, 1987, in the case set forth in the caption hereto; that I took down in Stenotype all of the proceedings; that my notes of the said hearing were reduced to typewriting by me using computer-aided transcription; and that the foregoing pages do contain and constitute a full, true, and correct transcript of that hearing.

SIGNED this 14th day of June, 1991, at Englewood, Colorado.

Kathleen Ozog Heymans

Kathleen Ozog Heymans, CSR

State of Colorado
Eighteenth Judicial District
Arapahoe, Douglas, Elbert & Lincoln Counties

GREGORY C. LANGHAM
DISTRICT ADMINISTRATOR

ARAPAHOE COUNTY JUSTICE CENTER
7325 SO. POTOMAC ST.
ENGLEWOOD, CO 80112
(303) 649-6382

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO
91 APR 16 PM 2:07
JAMES R. MANSPEAKER,
CLERK
BY _____ DEP. CLK

April 1, 1991

Cary Gagan
Huerfano County Jail
500 S. Albert St.
Walsenburg, Colorado 81089

RE: Request for Transcripts

Dear Mr. Gagan:

Please be advised that your March 18, 1991, request to have Judge Steinhardt authorize the preparation of transcriptions of specific hearings has been approved. The appropriate court reporters have been notified.

Sincerely,

Gregory C. Langham
District Administrator

GCL:pd

cc: Joyce S. Steinhardt, Chief Judge
Case File Nos. 86CR539 and 86CR451
Rosemary DeMartini, Court Reporter

GAGAN J. GUNTER
91-C-0005

ON APR 16, 1991 A COPY OF CORRESPONDENCE
FROM DISTRICT COURT JUDGE GREGORY LAFFERTY
TO THE PETITIONER (91-C-0005) WAS
HAND DELIVERED TO THE OFFICE OF THE
COLORADO ATTORNEY GENERAL AT 110 16TH ST,
10TH FLOOR. THE BELOW SIGNED HEREBY
ACKNOWLEDGES RECEIPT OF SUCH ON
THIS APR 16, 1991 DATE

RECEIVED
APR 16 1991
OFFICE OF THE
ATTORNEY GENERAL

Wendy Ritz
Assistant Attorney General
110 16th St., 10th Floor
Denver, CO. 80202

May 16, 1991

Re: CARY JAMES GAGAN
U.S. DISTRICT COURT CASE NO. 91-C-0005

Dear Ms. Ritz:

As you are aware Magistrate Judge Richard Borchers has appointed the Office of the Federal Public Defender to represent me in the above shown case. The public defender handling this matter is:

Vicky Mandall King
999 18th St. #207 (294-7002)

Enclosed please find several documents that would confirm that the Honorable Joyce Steinhardt has ordered the preparation of other transcripts. This Order was pursuant the MOTION FOR PREPARATION OF TRANSCRIPTS AT STATE EXPENSE that I filed and for which you were provided a copy.

In another matter filed with Judge Steinhardt (writ of habeas corpus) in February of 1991, her honor's Order regarding that writ is attached hereto. On page (2), the 2nd paragraph, Judge Steinhardt has indicated the sentence in 86CR539 was appealed and affirmed by the Colorado Appellate Courts. I've contacted the Court of Appeals on whether the sentence itself was appealed and was informed that on each appeal the sentence is reviewed along with the issues presented on appeal. In short, it would appear that I have exhausted my state remedies as to the propriety of my sentence.

I will be requesting of public defender Vicky King that the appropriate motion be filed with the U.S. District Court that would request that this federal court also review the legality of my sentence that includes two counts where, in essence, I was the trial court's newly named "victim(s) of my alleged acts of criminal impersonation. As you may recall I moved for judgment of acquittal on these criminal impersonation counts after the prosecutor had rested. I did so under the theory there was no evidence presented that could show that by assuming the alleged false names of JERRY MCCABE and CARY JAMES I could have injured or defrauded (by attempting to obtain monies) the prosecutor's named victims on these criminal impersonation counts...Farmers Ins. Group and GAB Account Adjusters. Judge Leopold denied the motion for judgment of acquittal and I stood on

4e

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
FEB 13 1992
JAMES R. MANSPEAKER
BY _____ DEP CLERK

Civil Action No. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

vs.

FRANK GUNTER AND ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Respondents.

SUPPLEMENTAL RESPONSE TO STATUS REPORT FILED BY PETITIONER IN SUPPORT OF RESPONSE TO STATUS REPORT FILED BY COUNSEL

Petitioner Gagan, pro se, supplements his counsel's filed RESPONSE TO STATUS REPORT on January 23, 1992, and states as follows:

1. Petitioner's counsel in this case could further apprise this Court that this Petitioner is totally familiar with the entire available record on file in this federal appeal, as well as this Petitioner totally familiar with the content and issues of other state court proceedings/hearings not designated and/or transcribed for the record that was not made available to the Colorado Court of Appeals.

2. That for the purpose of obtaining full review of his claims in both post conviction proceedings under Rule 35(c) of the C. R. Crim. Proc. in the Arapahoe County District Court, as well as having this federal Court have the opportunity to review other pertinent hearings, in March of 1991 this Petitioner filed with the Arapahoe County District Court the incorporated MOTION FOR PREPARATION OF TRANSCRIPTS AT STATE EXPENSE marked Exhibit "A". As so indicated on page 1 of this said motion, on March 22, 1991, Judge Joyce Steinhardt granting the Petitioner's motion for the preparation of transcripts for, in part, the following court hearings held on July 22, 1987; July 24, 1987; September 15, 1987; September 18, 1987; and October 5, 1987.

3. That when reviewing the attorney for respondent's status report regarding the availability of these transcripts on the above shown specific dates (para. no. 7), it becomes apparent that both Janice Hibbard and Kathleen Ozog Heymans (court reporters) failed to comply with Judge Joyce Stein-

26